the Workmen's Compensation Ordinance, now finds himself faced with another claim. He might have saved himself all this trouble if he had, after arriving at the compromise, hailed the father and mother of the deceased before the commissioner to record a settlement under the second part of section 41(1) to include the other members of the family, but that is hind-sight wisdom and he could not have known, on the facts advanced to him by the father and mother of the deceased that not only the younger brothers and sisters but also the elder brother and sister of the deceased claimed to be dependants.

In the result, the application is refused, but in all the circumstance of the case, there will be no order as to costs. I am grateful to the Legal Adviser, Perak, for so ably assisting the court and would assure him that in denying costs to the commissioner, I am in no way casting any adverse reflection on him.

*Application refused.*

Solicitors: *Arulanandom & Co.*

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## KUEH TECK LIN & ORS. v. HOCK HUA BANK LTD.

**[O.C.J. (Williams J.) April 27, 1968]**
**[Kuching — Civil Suit No. K. 119 of 1967]**

*Land Law — Easement of support — Not registered — Indefeasibility of title — Land Code (Sarawak Cap. 8), s. 132 — Land Settlement Ordinance (Cap. 28 Rev. edn. 1948), ss. 26, 34, 50.*

*Negligence — Standard of care — Failure to underpin party wall — Damage to adjoining houses — Whether foreseeable.*

The plaintiffs and the defendant were registered owners of the adjoining parcels of land. A row of shophouses had been built on the lands, on foundation which ran through from the plaintiffs' to the defendant's land. The defendant demolished two shophouses on its land, and erected a new building on the site. The plaintiffs brought an action for (1) damage caused to his shophouse because of the defendant's failure to underpin the party wall; (2) damage caused to the roof as a result of the negligent acts of workmen engaged in the construction of the new building. The claim was based on the existence of an easement of support and negligence.

**Held:** (1) the Land Settlement Ordinance required all rights affecting land to be registered. As the register did not show that the plaintiffs were entitled to an easement of support, his claim for damages under this head therefore failed;

(2) damage arising from the failure to underpin the party wall was foreseeable. By failing to underpin the wall, the defendant did not exercise the standard of care required of it and was liable for the consequent damage to the plaintiffs' shophouse.

**Per Williams J.:** "I do not think any easement can be founded upon any basis put forward upon either implication or presumption. Land law in Sarawak is, for better or worse governed by the Land Code and . . . section 132 clearly lays down the principle of the indefeasibility of title".

*Cases referred to:—*

(1) *Anne & Margaret Dodd* v. *Samuel & James Holme* 110 E.R. 1296.

(2) *Southward & Vauxhall Water Co.* v. *Wandsworth District Board of Works* [1895-9] All E.R. Rep. 422.

CIVIL SUIT.

*T. O. Thomas* for the plaintiffs.

*S. K. T. Yong* for the defendant.

*Cur. Adv. Vult.*

**Williams J.:** This case concerns a claim for damages for damage to a shophouse No. 27 Rock Road, Kuching, resulting from the demolition of shophouses formerly known as Nos. 28 and 29 Rock Road and the construction on the site of a new building. Shophouse No. 27 is situated on that parcel of land known as No. 9 of section 25 of Kuching Town Land District whilst shophouse No. 28 was situated on that parcel of land known as No. 10 of section 25 of the Kuching Town Land District. The plaintiffs are the registered proprietors of the former parcel of land whilst the defendant is the registered proprietor of the latter. The central issue of fact in this case is did the erection of the defendant's building result in damage to the plaintiffs' shophouse. If so, then (1) is the defendant estopped from denying liability; (2) is the defendant liable for interfering with the right of support; or (3) did the defendant's agents act negligently so as to cause damage to the plaintiffs' property.

With regard to the damage, however, I note there are two questions. One arises out of the damage caused by the subsidence, if any, of the land comprising parcel No. 9. The other arises out of the damage caused to the roof of the shophouse No. 27 as a result of the negligent acts of the workmen engaged in the construction of the new building.

The first question that I will concern myself with is that of damage caused by the foundation work carried out in respect of the new building. In this matter I have had the benefit of the opinions of two expert witnesses. Mr. Gudgeon, for the plaintiffs, attributes the damage, namely the cracks in the party walls, in the cross walls, in the ground floor slab and sundry minor damage to the roof, lintels, windows and doors, to an interference with the existing foundations of the party wall between shophouses No. 27 and No. 28. In his opinion there has been a failure to underpin that wall as was originally intended and planned for. There has thus been a settlement caused by the construction of the new building which in turn, as I understand it, has caused the old wall to crack. This settlement has caused the party wall between shophouses Nos. 27 and 28 to drag on the party wall between shophouses

Nos. 26 and 27 causing that to crack also. He does not agree that the cracks in question were caused by a settling of the back portion, which is heavily built upon, of shophouse No. 27.

Opposed to this view there is the opinion of Mr. Scarlett. He attributes the cracking of the party walls to a settlement of the rear of the shophouse No. 27 and discounts the effect that the excavation work and failure to abide by the original plan would have. Indeed he is of the opinion that such interference as there was to the old foundations, amounting to approximately 12% of the mattressing under the footing of the wall and to some 4" x 6' of the footing itself at the liftpit, would be offset by the reduction in load resulting from the demolition of the former shophouse No. 28 on the old party wall. The new building has its own wall. In all, the change of plan in his view would be an improvement on the situation originally contemplated.

Having heard these two men and having inspected the building I find that the probabilities of the case weigh heavily in favour of Mr. Gudgeon's view. I note that there was one extensive crack at the air-well of shophouse No. 27 before any excavation work was done. I note too, the pairs of cracks that are now so prominent in both party walls of that building. But against this is the fact that the evidence is to the effect that there was originally only one crack of any size. Had there been a settlement of the rear of the building as described by Mr. Scarlett one would have expected at least that there should have been a crack on the opposite wall. Then also there is no suggestion that the other pair of cracks, that is those further towards the back of the shophouse were in being before work on the new building was commenced. The inference in such a case is that the cracks were caused by that very work. I am confirmed in this view by the substantial crack that occurs towards the front portion of the party wall of shophouses Nos. 27 and 28 opposite the lift-pit of the new building as stated by Mr. Gudgeon. It is true that this is of a somewhat different character from those already referred to by Mr. Scarlett, who readily and very fairly considered that this was not caused by any longitudinal settlement i.e. it was caused by some other form of settlement. That other form of settlement is only too apparent from an examination of the ground floor of shophouse No. 27. There is no appreciable "hogging" to that floor, at least not to my eye, but there is a very definite sloping from the centre to the party wall of shophouses Nos. 27 and 28. This is apparent both to the eye and to the touch and is clearly of a serious nature. Again from the proximity of this phenomena to the foundations of the new building I can but think that it was caused when the footing to the new building was put in.

The question that then arises is upon what basis, if any, can the plaintiffs claim against the defendant. I do not think that the defendant is estopped from denying liability. That the defendant's agents did intimate that they would accept responsibility for damage attributable to them is, I think, correct. The correspondence is to that general effect. But again I think the answer given by Mr. Kueh Teck Lin in cross examination as to what was said to him by those agents when they came to see the building is significant, namely that they would remedy defects which were their fault. Their liability then was qualified. Further, there is no evidence that the plaintiffs ever acted to their detriment on any representation made by the defendant. These factors are, I think, in the circumstances of this case fatal to the plaintiffs' claim on this basis.

I now come to a question of very considerable legal importance and that is whether an easement of support can have been created and if created subsist in this instance. Mr. Yong has given me the benefit of much learned argument based upon the law relating to the presumption of grants. He has referred me to the principles relating to common law prescription, the doctrine of 'lost modern grant' and the Prescription Act; none of which he says can apply. Mr. Thomas, for the plaintiffs, has relied in the first instance upon the principle of an implied grant and in the alternative upon the Prescription Act. I have referred to the various authorities quoted and would but say that in the circumstances of this case I do not think that any easement can be founded upon any basis put forward; upon their implication or presumption. Land law in Sarawak is, for better or for worse, governed by the Land Code and in this instance I will begin by referring to section 132 of that Code. Section 132 clearly lays down the principle of the indefeasibility of title. Thus one cannot go behind the registered interests of any proprietor other than in the case of an expressed exception. The only exception which could possibly have reference here is that set out in paragraph (f) to sub-section (1) of section 132. However, that exception, whilst it would allow an easement to exist albeit that it was not registered on the 1st day of January 1958 is, I think, in this case qualified by the fact that the land we are concerned with was settled in 1937. The question then is in this instance did any easement subsist on the 1st of January 1958. I think not. In the Land Settlement Ordinance, under which settlement in this instance took place, there was no provision for the retention of easements which might have existed prior to settlement, such as exists in

section 62 of the Land Transfer Act of 1952 of New Zealand. Section 26 of the Land Settlement Ordinance provides for the investigation of all claims and the preparation of a schedule of rights which, in paragraph (e), expressly includes any servitude affecting the parcel of land or enjoyed by the owners of that parcel of land over any other land and for the name and address of persons entitled to such servitude. The easement in this case if it ever existed would, of course, constitute a servitude over the defendant's land. The schedule of rights did not mention any such servitude and the register thus created shows the land to be free from such an interest. For such an interest to exist would, to my mind, conflict with that register. Such a situation would be governed by the express provisions of section 34 of the Land Settlement Ordinance and thus it could not be. Section 50 of the Land Settlement Ordinance also, to my mind, provides for the registration of any new easements. The whole scheme then, although in some respects the Ordinance is loosely worded, was clearly meant to place all rights on the register. If they are not registered they have no effect and section 54 would serve to confirm me in this view. Thus then do I say that a right in this instance could not have subsisted in 1958 and cannot have arisen since.

The plaintiffs' claim, therefore, must, if it is to succeed, rest upon negligence. The basic proposition is that the operation was under the control of the defendant's agents. The operation as I have found has resulted in damage. Mr. Thomas argues that the negligence speaks for itself, and in this respect I think he would find support in the case of *Anne and Margaret Dodd* v. *Samuel and James Holme.*[1] I have found this a difficult question to decide and it is only with hesitation that I have come to the conclusion that he is right. Mr. Yong has relied upon a proposition of law as to what would constitute negligence in this case. That proposition I think can best be explained by repeating the words of Henn Collins L.J. in *Southwark and Vauxhall Water Company* v. *Wandsworth District Board of Works* [2] at p. 426, where he said:—

> "I think they can have no higher claim to consideration at the hands of the defendants than the owner of a house for which no right of support from the adjoining house had been acquired would be entitled to claim against the adjoining owner who in pulling his house down withdraws support to which his neighbour is not entitled. I think it is clear in such case that, though the pulling down owner must be careful to interfere as little as possible with the adjoining house, he is certainly not called upon to take active steps for its protection as, for instance, by shoring it up."

The reasoning behind this proposition is clear. It is that where there is no trespass and a man is merely exercising admitted rights on his own land to circumscribe his activities by placing upon him a positive burden not to interfere with another man's house would be to limit those rights. It would in effect be granting protection to a neighbour when no such protection by way of an easement of support was given to him in law. Here there is the opinion of Mr. Scarlett that the moving of the footing to the new building was in the circumstances a 'big improvement' and that the decision to do so was correct. In his view, therefore, the change of the plan must necessarily have been reasonable. On this Mr. Yong's argument would appear to be that the original scheme would have caused more damage than has in fact occurred. He has too stressed that reasonable precautions not to cause damage were in fact taken as was explained by Mr. Ting Ah Loong.

Yet I cannot help but think, apart from the value of the land involved, that if the underpining of the party wall was not desirable, a sound piece of building technique, the original plan would not have been put forward for approval. The wall in question was old and needed protection. More particularly the foundations were interfered with and in this respect I am particularly influenced by the fact that those foundations were one unit, to my mind an indivisible unit, going from the defendant's land through and on to the plaintiffs' land. To affect those foundations, albeit only directly so, on the defendant's land would necessarily pass that effect through and on to the plaintiffs' land. Damage, therefore, could reasonably have been foreseen. To my mind that damage could best have been avoided by the underpining as was originally intended. Thus in the circumstances of this case has the failure to keep to that scheme fallen short of the standard of care required.

As to the roof there is in truth no dispute that the workmen of the construction company were negligent, and that damage was caused to the tiles and to the cover of the air-well and that in turn there was certainly a leakage of rain water.

It is then in these circumstances that I consider what compensation may be awarded to the plaintiffs. I will say at once that I accept Mr. Gudgeon's estimates except for the point that I can but assume from his reasoning that if the creation of subsidiary cracking is to be avoided the estimate given by him for the cost of the scheme to underpin the plaintiffs' walls includes the cost of relaying the whole floor. There would simply be no point in estimating for relaying only half that floor. Also in that he has included incidental damage to the roof I accept his figure for that particular damage. In this respect I would say that I find that the

leaks complained of have been cured and that the replacing of the front of the roof is something which the plaintiffs have thought desirable rather than necessary. Thus for the estimation of the cost for repairs as given by Mr. Gudgeon I award $8,330. As for the other matters not covered by Mr. Gudgeon and referred to by Mr. Paul Yong I award damages on the following basis:—

| | |
|---|---|
| Adjusting the door and collapsable gate and replacing the frames .. .. .. | $200 |
| Taking down the show cases and fitting them back after repairs .. .. .. | $300 |
| Cost of storage of goods during the period of repairs (3 weeks) .. .. .. | $770 |
| Cleaning the building .. .. .. | $100 |

As to the loss of profits there has been a remarkable 'error' and upon the basis of the net profits of two years I award damages of $491.28 for that. In that the receipt of profits contemplates the payment of staff and overheads I cannot see how this sum can be claimed at all and I disallow it.

As for the damage of the goods in the shop arising from a leakage to the roof I can but say here again that the plaintiffs, to my mind, overstated their case. In particular I would prefer the evidence of Mr. Ting to anything that has been put to me to suggest he visited the shop in order to examine these particular goods before the list of goods, Ex. P.10, was prepared in May 1967. The evidence of Mr. Kueh Teck Lin was far from convincing in this respect, and I particularly note that the question of damage to fans and to the cabinet leave much to be desired. That packages were damaged I do not doubt but that there has been a total loss of saleable value for the majority of these items cannot, to my mind, be true. I would, therefore, allow only what I consider on the evidence to be a fair price for the items set out in Ex. P.10 excluding fans and cabinet. This I estimate to be $2,750.65. It is in these circumstances that I enter judgment for the plaintiffs against the defendant in the sum of $12,941.93.

*Order accordingly.*

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## *RE* APPLICATION OF ASIA INSURANCE CO. LTD. OSMAN v. TAN SWEE LIANG

**[O.C.J. (Pawan Ahmad J.) May 3, 1968]**
**[Ipoh — Suit No. 684 of 1967]**

*Practice and Procedure — Judgment in default of appearance — Whether stranger to the proceedings can set it aside — Regular judgment — No merits disclosed in affidavit — Grounds and source of information not disclosed — No reason for not entering appearance — Not entitled to set aside — R.S.C. 1957, O. 13 r. 10; O. 27 r. 15; O. 70 r. 3 — Courts of Judicature Act, 1964, s. 23 — Courts Ordinance, 1948, 3rd Sch. r. 2(1).*

*Road Traffic — Notice of proceedings to insurer — Road Traffic Ordinance, 1958; s. 80(2)(a).*

As a result of a collision between a motor vehicle driven by the defendant and a motor cycle ridden by the plaintiff, the latter suffered injuries. The motor cyclist's solicitors wrote to the defendant that unless the matter was settled amicably legal proceedings would be instituted to claim damages and sent a copy of the letter to the defendant's insurers. There being no reply the plaintiff issued and served a writ to which no appearance was entered. The plaintiff then obtained an interlocutory judgment in default of appearance. Following this the insurers made an application by way of summons in chambers under Order 13 rule 10 and Order 27 rule 15 of the Rules of the Supreme Court, 1957 to set aside the interlocutory judgment entered against the defendant.

**Held,** dismissing the application: (1) though the applicants were strangers to the action they were still entitled to make the appplication on the ground that they might be seriously affected by the judgment;

(2) as on the facts the interlocutory judgment was obtained regularly the applicants were not entitled to have it set aside as of right but had to satisfy the court by way of an affidavit that they had a *prima facie* defence and that they had a reasonable excuse for not entering appearance. The affidavit of the defendants was not an affidavit of merits and it did not disclose that the applicants had a *prima facie* defence.

*Cases referred to:—*

(1) *Jacques* v. *Harrison* (1884), 12 Q.B.D. 165.

(2) *Windsor* v. *Charlcraft* [1939] 1 Q.B. 279.

(3) *The South British Insurance Co. Ltd.* v. *Haji Ismail: Sim Kek Yeow, Intervener* [1964] M.L.J. 16.

(4) *Evans* v. *Bartlam* [1937] A.C. 473, 480.

ADJOURNED SUMMONS.

*Daljit Singh* for the applicants.

*P. P. Dharmananda* for the plaintiff.

Defendant absent.

*Cur. Adv. Vult.*

**Pawan Ahmad J.:** This is an application by way of summons-in-chambers under Order 13 rule 10 and Order 27 rule 15 of the Rules of the Supreme Court, 1957, to set aside the interlocutory judgment entered against the defendant on the 25th day of January 1968. The application was subsequently adjourned to open court for hearing under Order 54 rule 22.

The applicants who are the Asia Insurance Company Limited, by a policy of insurance dated the 25th day of January 1967 insured the defendant, among other things, against liability for injuries suffered by any third party caused by or in connection with the use of motor vehicle No. JB 379. This policy was valid from 1st January 1967 to 31st December 1967.

On 15th March 1967 at about 4.00 p.m. the said motor vehicle driven by the defendant had a collision with a motor cycle ridden by the